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In The

Supreme Court of the United States

OCTOBER TERM, 1971

No. 70-93[1]

NATIONAL LABOR RELATIONS BOARD, *Petitioner*,

V.

NASH-FINCH COMPANY d/b/a JACK & JILL STORES, RESPONDENT

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE RESPONDENT

OPINIONS BELOW

The opinion of the Court of Appeals in this case is reported at 434 F.2d 971 (8th Cir. 1970), and is set out in the Appendix in this case at pages 54-63. The Memorandum and Order of the District Court in this case are not officially reported, but are unofficially reported at 72 L.R.R.M. 2373 (D. Neb. 1969), and are set out in the Appendix at pages 44-51.

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[1] This case was numbered 1420 in the October Term, 1970.

QUESTIONS PRESENTED

1. Whether or not the District Court correctly dismissed the complaint of the National Labor Relations Board seeking an injunction of the state court proceeding due to the limitations of 28 U.S.C. § 2283 (1965).

2. Whether or not the National Labor Relations Board stands in the same position as the United States in the instant case, thereby giving the District Court jurisdiction regardless of the limitations of 28 U.S.C. § 2283 (1965).

3. Whether or not this Court has the power to imply a specific exception to the limitations of 28 U.S.C. § 2283 (1965) to allow the National Labor Relations Board to seek injunctions of State Court proceedings in the area of labor relations from federal District Courts.

4. Whether or not the State Court Order, which regulates nonpeaceful picketing, has entered into a field that has been preempted by congressional legislation and governed exclusively by the National Labor Relations Act.

5. Whether or not the doctrine of federal preemption gives the District Court independent jurisdiction in this matter notwithstanding the fact that the National Labor Relations Board does not fit within any of the specified exceptions to the limitations of 28 U.S.C. § 2283 (1965).

6. Whether or not the desire to avoid needless friction between state and federal judicial systems and the desire to allow State Courts to proceed in an orderly manner without interference from Federal Courts is a superior federal interest to the interest of federal preemption asserted by the National Labor Relations Board in this case.

STATEMENT

The Nash-Finch Company (hereinafter referred to as the Company or the Respondent) is a Delaware Corporation with headquarters in Minneapolis, Minnesota. The instant case deals with the Jack & Jill Food Stores operated by the Company in Grand Island, Nebraska. In August, 1968 the Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO (hereinafter referred to as the Union), began an organizing campaign among the meat department employees of the Jack & Jill Food Stores of the Company in Grand Island. The Union demanded recognition based upon signed authorization cards in August and the Company, expressing a good faith doubt concerning the Union's majority status, refused to bargain and filed a petition with the National Labor Relations Board (hereinafter referred to as the Petitioner or the Board) for an election.

In October, 1968, the Union filed an unfair labor practice charge with the Board alleging that the Company was violating the National Labor Relations Act by refusing to bargain with the Union and by other conduct. A complaint was issued by the Board and the matter was set for hearing. In April, 1969, the Trial Examiner found that the Company had violated various portions of the Act (A.9-26).

The Board reversed the Trial Examiner in September, 1969 and concluded that the Company had not illegally refused to bargain with the Union for the reason that the Union had not represented a valid majority of the Company employees when the initial bargaining demand was made in August, 1968.[2] The

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[2] *See Nash-Finch Company d/b/a Jack & Jill Stores*, 178 N.L.R.B. No. 77, 72 L.R.R.M. 1144 (1969).

Board did conclude that the Company had violated the Act by various other actions and it issued a cease and desist order regarding those violations.[3] Subsequent to the Trial Examiner's decision, but prior to the issuance of the Board decision, the Union began picketing the Company's Grand Island, Nebraska stores and a number of other Company stores across the State of Nebraska. On May 27, 1969, the Company petitioned the District Court of Hall County, Nebraska (hereinafter referred to as the state court) for injunctive relief against this picketing. On May 28, 1969 the Honorable Donald H. Weaver issued a restraining order against the Union and set the matter for hearing on June 8, 1969 (A.31). On June 25, 1969, Judge Weaver issued a temporary injunction (A.7-8).

No charges concerning the picketing or the state court injunction have been filed by any party (A.48). However, on August 29, 1969, the Board filed a complaint in the United States District Court for the District of Nebraska, attempting to obtain an injunction against the state court injunction (A.4-6). On September 5, the Board moved the District Court for a preliminary injunction (A.33-34), and on September 8, the Union moved to intervene as a party plaintiff in the District Court action (A.36-41). Thereafter, the Company moved to dismiss the Board's complaint and filed objections to the Motion to Intervene (A.42-43).

On September 26, 1969 the Honorable Robert Van Pelt granted the Company's motion to dismiss and de-

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[3] Pursuant to the cease and desist order of the Board, notices were posted in the Company's Grand Island stores on September 26, 1969 for the sixty-consecutive days required by the Board's decision. It is uncontested that the Company has met compliance requirements for Case No. 17-CA-3697, but the case has not been closed due to a Board policy that a case should not be closed, even after compliance, if an injunction case is pending between the same parties.

nied the Union's Motion to Intervene (A.44-51). The Board (A.52) and the Union (A.53) filed notices of appeal to the United States Court of Appeals for the Eighth Circuit and the Circuit Court subsequently affirmed the ruling of the District Court (A.54-64). Thereafter, this Court granted certiorari (A.65).

SUMMARY OF ARGUMENT

This case does not involve peaceful picketing. Accordingly, the federal interest in allowing the State of Nebraska to exercise its police power to regulate non-peaceful picketing is controlling in the instant case rather than the federal interest of having the National Labor Relations Board preempt the regulation of peaceful picketing. The Nebraska Mass Picketing Statute and the injunction obtained in the state court constitute a proper exercise of the police powers reserved to the State of Nebraska. Strong public policy considerations and the specific congressional mandate of 28 U.S.C. § 2283 prohibit the injunctive relief against the state court proceedings sought by the National Labor Relations Board.

Even though the limitations of 28 U.S.C. § 2283 do not apply to actions brought by the United States to obtain injunctive relief of state court proceedings which threaten irreparable injury of federal interests, the National Labor Relations Board may not escape the limitations of 28 U.S.C. § 2283. Agencies of the federal government are not to be considered in the same position as the United States unless the Congress has specifically expressed an intent to provide the agency with such privileges and immunities. Since the Congress has not provided the National Labor Relations Board with the power to exercise the privileges and immunities of the United States, the limitations of 28 U.S.C. § 2283 may not be circumvented in the instant case.

The Nebraska Mass Picketing Statute at issue in this case is subject to attack only on the issue of federal preemption, as indicated by the specific wording of the "question presented" upon which certiorari was granted. Since the picketing in the instant case was not peaceful, the federal interest in reserving regulation of nonpeaceful picketing to the states under their police power prevails over the argument of federal preemption asserted by the National Labor Relations Board. Additionally, any argument of federal preemption is meaningless if initial jurisdiction has not attached, and due to the limitations of 28 U.S.C. § 2283, jurisdiction will not attach on the basis of federal preemption alone. The lower courts should be affirmed.

I.

ARGUMENT

The Circuit Court was correct in affirming the District Court's Dismissal of the Board's Complaint in this case due to both policy and statutory considerations.

At the outset, it must be noted that the instant case involves the very important question of the balance to be struck between national and state objectives in the field of labor relations. As a consequence, this case presents matters of a very basic legal and philosophical nature for resolution by this Court. However, no case may be determined upon legal theory alone without recourse to the specific factual setting in which the case reaches the Court, and it must be emphasized that the instant case *does not* involve peaceful picketing. Both the Board[4] and the Union[5] either have the impression, or are attempting to give the impression, that the picketing in the instant case was peaceful.

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[4] *See* Petitioner's brief at 34-35 n.16; *see also* Board's Petition at 2.

[5] *See* brief for Union as amicus curiae at 2 and 7.

The only judicial determination in the instant case on the facts is the state court decision which determined that the picketing in this case constituted a violation of the Nebraska Mass Picketing Statute (A.7-8). Affidavits filed in the state court in support of the Company's Petition for a Temporary Restraining Order and Temporary Injunction indicate that the state statute was in fact violated. *See* Addendum A to this brief.[5a] However, in addition to the violations of the Nebraska Mass Picketing Statute, the picketing in the instant case was punctuated by numerous bomb threats, substantial numbers of nails in several store parking lots, the pouring of kerosene over fresh meat in display cabinets, and considerable property damage, involving not only the Jack & Jill Stores in Grand Island, Nebraska but also at the Jack & Jill Stores in Lincoln, Beatrice, York, and Hastings, Nebraska. These various activities which accompanied the picketing in the instant case are evidenced by the official department records of the Grand Island, Nebraska Police Department,[6] the Grand Island, Nebraska Fire Department[7]

[5a] The Company submits that the Court may take judicial notice of these filings in the state court upon the authority of *Pennington v. Gibson*, 57 U.S. (16 How.) 65, 81 (1853); *see also Craemer v. Washington*, 168 U.S. 124, 129 (1897); *Zahn v. Transamerica Corp.*, 162 F.2d 36, 48 n.20 (3rd Cir. 1947); *United States v. Bleasby*, 257 F.2d 278 (3rd Cir. 1958); *Paul v. Dade County, Florida*, 419 F.2d 10, 12 (5th Cir. 1969); *St. Paul Fire & Marine Ins. Co. v. Cunningham*, 257 F.2d 731, 732 (9th Cir. 1958).

[6] *E.g.*, 1) Complaint Report No. 9058 (July 2, 1969) concerning a bomb threat at the Jack & Jill Store at Second and Broadwell in Grand Island, Nebraska on that date.

2) Complaint Report No. 9122 (July 5, 1969) concerning a bomb threat at the Jack & Jill Store on South Locust Street in Grand Island, Nebraska on that date.

(3) Complaint Report No. 9538 (July 13, 1969) concerning an accident on property of Jack & Jill Store at Second and Broadwell in Grand Island, Nebraska.

the Lincoln, Nebraska Police Department[8] the Bea-

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4) Complaint Report No. 9841 (July 26, 1969) concerning vandalism to car at the Jack & Jill Store at South Locust Street.

5) Complaint Report No. 10394 (August 12, 1969) concerning window breakage in door of Jack & Jill Store at Second and Broadwell in Grand Island, Nebraska on that date.

6) Complaint Report 10936 (August 27, 1969) concerning bomb threat at Jack & Jill Store on South Locust Street on that date.

7) Complaint Report No. 10961 (August 28, 1969) concerning nails thrown in driveway of Jack & Jill Store at Second and Broadwell in Grand Island, Nebraska.

8) Complaint Report No. 11016 (August 29, 1969) concerning threat at Jack & Jill Store at Second and Broadwell in Grand Island, Nebraska.

9) Complaint Report No. 11048 (August 30, 1969) concerning bomb threat at the Jack & Jill Store at Second and Broadwell in Grand Island, Nebraska.

10) Complaint Report No. 11097 (September 1, 1969) concerning vandalism of phone booth in parking lot of Jack & Jill Store at Second and Broadwell in Grand Island, Nebraska.

[7] *E.g.*, 1) Report No. 99 (July 2, 1969) bomb threat at Jack & & Jill Store at Second and Broadwell in Grand Island, Nebraska on that date. Store evacuated. False alarm.

2) Report No. 100 (July 5, 1969) bomb threat at Jack & Jill Store on South Locust street in Grand Island, Nebraska. Store evacuated. An M-80 firecracker actually exploded in the store causing damage to merchandise as store was being evacuated.

3) Report No. 7 (August 27, 1969) bomb threat at Jack & Jill Store on South Locust Street in Grand Island, Nebraska. False alarm.

4) Report No. 10 (August 29, 1969) bomb threat at Jack & Jill Store at Second and Broadwell in Grand Island, Nebraska. False alarm.

[8] *Eg.*, 1) Case No. G-1369 (July 5, 1969) concerning a bomb threat at the Jack & Jill Store at 70th and Vine Streets in Lincoln, Nebraska on that date and an actual explosion in the store on that date of some type of an explosive material.

2) Case No. G-1646 (July 7, 1969) involving a follow-up investigation of Case No. G-1369 after it was discovered that kerosine had been sprayed over meat on the meat counter at the Jack & Jill Store at 70th and Vine Streets in Lincoln. As a consequence, state meat inspectors condemned seventy packages of beef, steak, and beef roast; seventy-five packages of pork chops and steak sausage, and eleven packages of cheese, for a total loss of $216.07.

trice, Nebraska Police Department,[9] the Hastings Nebraska Police Department,[10] the York, Nebraska Police Department,[10a] and the Nebraska State Department of Agriculture,[11] of which the Company submits the Court may properly take judicial notice upon the authority of *New York Indians v. United States*, 170 U. S. 1, 32 (1898). *See also Muller v. Oregon*, 208 U. S. 412, 420-21 (1908); *Smith v. United States*, 353 F. 2d 838, 844 (D. C. Cir. 1965) *cert. denied*, 384 U. S. 974 (1966); *Rhodes v. Meyer*, 334 F. 2d 709 (8th Cir. 1964) *cert.*

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3) Case No. G-3702 (July 21, 1969) involving the theft of five flags from the roof of the Jack & Jill Store at 70th and Vine in Lincoln. The flags were valued at $5 each for a total loss of $25.

[9] *See* Case No. 25424 (May 26, 1969) concerning the dumping of kerosine in a meat cooler at the Jack & Jill Store in the Indian Hills Mall Shopping Center. Evidence of the dumping of kerosine in the meat cooler was discovered but no arrests were made.

[10] *E.g.*, 1) Report dated August 26, 1969 concerning bullet hole through window of Jack & Jill Store at 2416 West Second Street in Hastings, Nebraska. Police report indicated that occurrence "appears to be a part of the strike action that is taking place at all of the Jack & Jill Stores."

2) Report dated October 24, 1969, involving nails in driveway of two employees of the Company that continued to work for the Company during the picketing.

[10a] *See* Report No. J-623 (July 5, 1969) concerning a bomb threat at the Jack & Jill Store in York, Nebraska.

[11] *See, e.g.*, Special Inspection Report of Nebraska Department of Agriculture Bureau of Dairies and Foods dated May 26, 1969 involving the Jack & Jill Store at the Indian Hills Mall Shopping Center in Beatrice, Nebraska indicating that 152 packages of frozen and fresh meats, 45 packages of different frozen products, and 14 bags of different size flour were taken off sale and destroyed by the assistant store manager because the food products were adulterated by kerosine and the flour sacks were slashed by some unknown sharp object. *See also* a Bureau Special inspection report dated July 7, 1969 involving the Jack & Jill Store at 70th and Vine Streets in Lincoln, Nebraska in which 70 packages of fresh beef, 75 packages of fresh pork, and 11 packages of cheese were taken off sale and destroyed by store employees in the presence of state food inspectors because the merchandise had been spoiled by having kerosine poured onto the packages in a meat display counter.

denied, 379 U. S. 915 (1964); *see generally, Brown v. Piper*, 91 U. S. 37, 42 (1875); 9 *Wigmore, Evidence*, § 2568a (1940); *McCormick, Evidence*, § 325 (1954).

While it is true that most of the activity referred to in the foregoing departmental records was committed by a person or persons unknown, it is significant to note that the Company was harassed with such activities only during the time in which the Union conducted its picketing, supporting a very strong inference of causal connection.[12] In fact, at least one picket was made the subject of a complaint in Fremont, Nebraska for verbalizing the same type of attitude toward a Company customer that the previously described activity symbolized toward the Company.[13]

The Company submits that the unlawful activity accompanying the picketing in the instant case, if not providing this Court with an ample reason to conclude

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[12] The "strong emotions" engendered by Company-Union disputes and the fact that violence makes strong demands on "calm judgment" during labor controversies has been recognized as obvious by this Court. *See N.L.R.B. v. Burnup & Sims, Inc.*, 379 U.S. 21 (1964); *Milk Wagon Drivers Union Local 753 v. Meadowmoor Co.*, 312 U.S. 287, 296 (1941) *rehearing denied* 312 U.S. 715 (1941). The obvious connection between the Union-Company conflict and the fact that the Company received harassment of the type described previously was noted in a number of the police reports listed above. In urging the Court to conclude that there is a strong inference of a causal connection between the Union and the events of violence that punctuated the picketing in the instant case, the Company points to the following comment of Justice Frankfurter as being particularly applicable: "There comes a point where the Court should not be ignorant as judges of what we know as men." *Watts v. Indiana*, 338 U.S. 49, 52 (1949).

[13] *See State v. James E. Brown* (August 25, 1969) before Justice of the Peace Daniel A. Martin involving a charge of disturbing the peace under NEB. REV. STAT. § 28-818 (Reissue 1964) by shouting an obscenity at a customer of the Company's warehouse in Fremont, Nebraska. Picket Brown was found guilty and fined $31.00.

that the picketing was definitely nonpeaceful, at least precludes this Court from accepting the notion proposed by the Union and the Board that the picketing in the instant case was completely peaceful. *See Milk Wagon Drivers Union Local 753 v. Meadowmoor Dairies, Inc.*, 312 U. S. 287, 291-92 (1941) *rehearing denied*, 312 U. S. 715 (1941). The Company takes care to emphasize this point because the state police power interest is obviously paramount if the picketing was non-peaceful whereas the federal interest of preemption is arguably paramount if the picketing was peaceful. While agency considerations may hamper a determination on the part of the Court that the picketing was *prima facie* violent, the records to which the Company draws the Court's attention certainly preclude any conclusion that the picketing was altogether peaceful. *See Senn v. Tile Layers Union*, 301 U.S. 468, 479 (1937).

Due to the great importance of state police powers and due to the nature of the unlawful activity which surrounded the picketing in the instant case, the Company submits that a finding that the picketing was *not peaceful* would certainly be justified. However, should the Court view such a determination as improper in an appellate setting, the Company requests that the case be remanded to the District Court for findings of fact on this matter. Of course, if the District Court was correct in concluding that it did not have jurisdiction in any event, neither a factual determination by this Court nor a remand would be necessary regarding the entire picketing issue.

A. The District Court Was Correct in Denying the Request of the Board For an Injunction Against the State Court Proceedings on the Grounds of Public Policy.

A number of substantial policy considerations support the decision of the District Court in its denial of the Board's request for an injunction against the State

Court proceedings. In the first place, due to the historical independence of both state courts and federal courts, there is a long standing reluctance on the part of federal courts to interfere with state judicial proceedings. *See Diggs and Keith v. Wolcott*, 8 U. S. (4 Cranch) 179 (1807) (and cases cited therein at n.1); *United States v. Council of Keokuk*, 73 U. S. 6 Wall. 514, 517 (1867); *see also Hayes Industries, Inc. v. Caribbean Sales Associates, Inc.*, 387 F. 2d 498, 500 (1st Cir. 1968); *Joseph Bancroft & Sons Co. v. Shelley Knitting Mills, Inc.*, 374 F. 2d 28, 32 (3rd Cir. 1967); *Sheridan v. Garrison*, 415 F. 2d 699, 707 (5th Cir. 1969); *Slater v. Stoffel*, 411 F. 2d 653, 655 (7th Cir. 1969); *Lenske v. Sercomb*, 401 F. 2d 520, 521 (9th Cir. 1968).

This reluctance is quite understandable in light of the longstanding realization that all state courts retain their own sphere of authority,[14] and the equally longstanding desire on the part of federal courts to avoid needless friction and conflict with state courts. *See Hale v. Bimco Trading Co., Inc.*, 306 U. S. 375, 378 (1939); *Oklahoma Packing Co. v. Oklahoma Gas & Electric Co.*, 309 U. S. 4, 8-9 (1939); *Toucey v. New York Life Ins. Co.*, 314 U. S. 118, 141 (1941); *Porter v. Dicken*, 328 U. S. 252, 254-55 (1946); *Elkins v. United States*, 364 U. S. 206, 221 (1960); *Atlantic Coastline R.R. Co. v. Brotherhood of Locomotive Engineers*, 398 U. S. 281, 286 (1970).

Secondly, the request of the Board to the District Court for an injunction of the Nebraska State Court proceedings would have undermined one of the most basic powers of the state—the state police power. *See Mutual Loan Co. v. Martell*, 222 U. S. 225, 233 (1911);

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[14] *See Farrington v. Tennessee*, 95 U.S. (5 Otto) 679, 685 (1877); *Steward Machine Co. v. Davis*, 301 U.S. 548, 616 (1937) (dissenting opinion).

Home Bldg. & Loan Ass'n v. Blaisdell, 290 U. S. 398, 434 (1934); *Louisville & Nashville R.R. Co. v. Central Stockyards Co.*, 212 U. S. 132, 150 (1909) (dissenting opinion). This is so for the reason that the Board would have had the District Court enjoin the State Court proceeding which had been brought under the Nebraska Mass Picketing Statute, which statute constituted an obvious and valid exercise of state police powers. *See U.A.W. v. Anderson*, 351 U. S. 959 (1956); *U.A.W. v. Wisconsin Employment Relations Board*, 351 U. S. 266, 271-72 (1956); *Allen-Bradley v. Wisconsin Employment Relations Board*, 315 U. S. 740, 749 (1942); *Youndahl v. Rainfair, Inc.*, 355 U. S. 131, 138-39 (1957); *U.A.W. v. Russell*, 356 U. S. 634, 640 (1958); *Brotherhood of Railroad Trainmen v. Jacksonville Terminal Co.*, 394 U. S. 369, 386 (1969); *U.M.W. v. Gibbs*, 383 U. S. 715, 721 (1966); *Int'l Brotherhood of Teamsters v. Vogt, Inc.*, 354 U. S. 284, 293 (1957); *Milk Drivers v. Meadowmoor Dairies*, 312 U. S. 287, 301, 319 (1941).

Thirdly, and perhaps most importantly, the Company submits that a review of the practical effects of the position the Board urged upon the District Court, and now urges upon this Court, presents a strong policy reason for denying the Board the relief requested. The Respondent bases this contention upon a number of considerations. First, the Board is quite clearly attempting to deny private litigants the right to obtain injunctive relief in labor disputes and to reserve the right to obtain injunctive relief in such situations solely to the Board. *See* Petitioner's brief at 28-37. Such a position might be more easily understood if the Board was limiting its request to cases involving peaceful picketing.

However, as noted previously, there has been absolutely no judicial determination that the picketing in the instant case was peaceful and there are substantial

reasons for concluding that it was not. Therefore, the Board is apparently seeking to substantially undermine the police power reserved to the states in the field of labor relations as regards picketing. The Respondent submits that if there is any area in which the state police power is necessary, it is the area of labor relations; and that undermining the police power of states in any event is not in the best interests of public policy. Since the position urged upon this Court by the Board would effectively undermine the exercise of a significant and important police power by the State of Nebraska, the Respondent submits that the Board's position is clearly not in the best interests of public policy.

Another strong policy consideration against the Board's desire to amass unto itself the sole right to obtain injunctive relief in labor disputes and to deny that right to private litigants is found in the Board's recognized unwillingness to obtain injunctions in labor disputes. The Board already has the sole right, after the issuance of a complaint based upon a meritorious unfair labor practice charge, to obtain injunctive relief in a federal court under either Section 10(j) or 10(l) of the National Labor Relations Act. *See Amalgamated Clothing Workers v. Richman Brothers Co.*, 348 U. S. 511, 520 (1955); *see also* Comment, *Developments in the Law—Injunctions*, 78 HARV. L. REV. 994, 1050 (1965); Comment, *Federal Power to Enjoin State Court Proceedings*, 74 HARV. L. REV. 726 (1961). However, the Board has been so reluctant to obtain injunctive relief at a time when the injunctive relief would do any good, at least for an employer, that this fact has been specifically noted and criticized by a subcommittee of the United States Senate. *See* STAFF ON SENATE COMM. ON THE JUDICIARY, 91st CONG., 1st SESS., SUBCOMM. REPORT ON SEPARATION OF POWERS 28 (Comm. Print 1970).

This issue was also recently raised in *Terminal Freight Handling Co. v. Solien*, — F. 2d —, 77 L.R.R.M. 2625 (8th Cir. 1971) in which the Circuit Court was presented with statistics indicating that the Board *does not* seek to obtain injunctions in 75 percent of the meritorious cases involving picket line situations. *Id.* at 2628-29 n.9. The Circuit Court noted that the statistics presented by the company in that case were also supported by the Board's 34th Annual Report which indicated that the Board sought injunctive relief in only 190 out of 784 meritorious cases, indicating that the Board failed to seek injunctive relief in 75.8 percent of the meritorious cases. *See* 34 N.L.R.B. ANNUAL REPORT, 199, 208, 238 (1969). The Respondent submits that the Board's failure to even seek injunctive relief in cases which are acknowledged to be meritorious is a clear indication that the additional power which the Board seeks will also not be used and that injunctions in labor disputes will, for all practical purposes, become a thing of the past.

Such a result is certainly not consistent with the purposes of the Act. *See* 29 U.S.C. § 151 (1965). In fact, since the Board has previously been accused of violating its obligation to enforce the terms and intent of the Act, the Respondent submits that the Board's efforts in this case to accumulate power in order to keep that power from being used by private litigants implies motivation for partisan, as distinguished from public, considerations. *See* STAFF ON SENATE COMM. ON THE JUDICIARY, 91st CONG., 1st SESS., SUBCOMM. REPORT ON SEPARATION OF POWERS (Comm. Print 1970). Of course, partisanship on the part of the Board is also not in keeping with the policies and purposes of the Act, the entire plan of constitutional government, or the best interests of the public. *See N.L.R.B. v. West Texas Utilities Co.*, 214 F. 2d 732, 740-41 (5th Cir.

1954); *Southern Steamship Co. v. N.L.R.B.*, 316 U. S. 31, 47 (1942).

For all of the foregoing reasons, the Respondent respectfully submits that this Court should conclude that the action of the lower court in denying the Board's request for an injunction against the Nebraska State Court proceedings is consistent with public policy and that the position urged by the Board is significantly contrary to public policy.

B. The District Court Was Correct in Denying the Request of the Board For an Injunction Against the State Court Proceedings Due to the Specific Limitations of 28 U.S.C. § 2283 (1965).

In addition to the important policy considerations described above, the District Court was faced with a specific statutory prohibition against granting the relief sought by the Board. 28 U.S.C. § 2283 (1965) explicitly states that:

> A Court of the United States may not grant an injunction to stay proceedings in a State Court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments.

The District Court correctly referred to § 2283 as a "rigid limitation" on the power of that court to grant the relief sought by the Board and appropriately noted that the Board must clearly fall within one of the three stated exceptions within § 2283, as noted above, in order to obtain the relief sought (A.44-45). *See Amalgamated Clothing Workers of America v. Richman Brothers*, 348 U. S. 511, 514, 516, 518 (1955); *Toucey v. New York Life Ins. Co.*, 314 U. S. 118 (1941); *Atlantic Coastline R. R. Co. v. Brotherhood of Locomotive Engineers*, 398 U. S. 281 (1970).

In passing on the import of § 2283 in a related context last year, this Court noted that:

> Any doubts as to the propriety of a federal injunction against state court proceedings should be resolved in favor of permitting the state courts to proceed in an orderly fashion to finally determine the controversy. The explicit wording of § 2283 itself implies as much, and the fundamental principle of a dual system of courts leads inevitably to that conclusion. *See Atlantic Coastline R. R. Co. v. Brotherhood of Locomotive Engineers, supra* at 297.

The Board argued before both the District Court (A. 45, 50) and the Circuit Court (A.61-63) that it fell within the first statutory exception to the limitations of § 2283. The Board based this contention on the fact that an unfair labor practice complaint had issued against the Company in Case No. 17-CA-3697 and that this complaint thus authorized the Board to seek an injunction under the National Labor Relations Act and fall within the "Act of Congress" exception to § 2283. However, the error in the Board's argument was obvious and was rejected by both the District Court (A.49, 50) and the Circuit Court (A.62) on the basis that the complaint in Case No. 17-CA-3697 did not in any way involve the picketing at issue in the instant case. Of course, since the only applicable portions of the National Labor Relations Act[15] require the issuance of a complaint prior to authorizing the Board to seek an injunction, the Board obviously did not fall within the "Act of Congress" exception to the limitations of § 2283. The Board has apparently decided not to burden this Court with such a frivolous argument and has admitted in its brief that it had no basis for obtaining an injunction under either § 10(j) or 10(l) of the Act. *See* Petitioner's brief at 29-30 n.14. With this admis-

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[15] Sections 10(j) and 10(l). *See* 29 U.S.C. § 160(j) and (l) (1965).

sion, the Board has thus apparently abandoned any argument that the instant case falls within the first statutory exception to § 2283.

There has never been any contention that the instant case presents an issue under the second statutory exception to the limitations of § 2283 as being necessary to aid the jurisdiction of the District Court as was the case in *Atlantic Coastline R.R. Co. v. Brotherhood of Locomotive Engineers, supra.* In addition, as is most often the situation in cases of this nature, "no one contends that the third exception contained in § 2283 'to effect or effectuate its judgments' is applicable." *See N.L.R.B. v. Swift & Co.*, 233 F. 2d 226, 232 (8th Cir. 1956). Still, the Board states that "Section 2283 is the only possible barrier to a hearing of the claim for injunctive relief in this case" *see* Petitioner's brief at 9. However, it is quite important to note that there is no claim made on behalf of the Board that this case falls within any of the three specific statutory exceptions to the limitations of § 2283.

C. The District Court Was Correct in Denying the Request of the Board For an Injunction Against the State Court Proceedings Under the "United States" Exception to the Limitations of 28 U.S.C. § 2283 (1965).

In addition to the three statutory exceptions to the limitations of § 2283, it has been established by this Court that the prohibition of § 2283 has no application to the United States as a party seeking an injunction of state court proceedings. *See Leiter Minerals v. United States*, 352 U. S. 220, 225-28 (1957). Upon this rationale, the Board contends that it is the United States for the purposes of this case and that it thus escapes the prohibition of § 2283. *See* Brief for Petitioner at 6-9. This argument was firmly rejected by both the District Court (A.45-46) and the Circuit Court (A.57-59). *See also N.L.R.B. v. Swift & Co.*, 233 F. 2d 226, 232 (8th

Cir. 1956). Of course, the decision to the contrary by Judge Thornberry in *N.L.R.B. v. Roywood Corp.*, 429 F. 2d 964, 970 (5th Cir. 1970) provided the conflict of the circuits upon which the Board based its petition in the instant case.

At first blush the argument of the Board that, as an agency of the federal government, it should be considered the United States for the purposes of this case contains a certain amount of appeal. However, the argument and the appeal are superficial only and disregard several quite basic distinctions. The first distinction that must be drawn consists of the basic realization that the Board is a governmental agency created by the Congress. The Congress did not create the Board to be the United States for all intents and purposes but, rather, to enforce a specific statute with specific powers following specified underlying policies and with specific limitations. *See New Orleans v. United States*, 35 U. S. (10 Pet.) 662, 736 (1836); *Pacific Ins. Co. v. Soule*, 74 U. S. (7 Wall.) 433, 444 (1868).

As regards the Board's power to seek injunctions in federal courts, the Congress provided two routes, neither of which is applicable in the instant case.[15a] Nevertheless, the Board argues that, apparently simply by virtue of its creation by Congress, it need not follow the restrictions on its power to seek injunctions established by Congress, and that it may proceed independently, claiming to be the United States.

This Court has previously rejected such an argument on the rationale that in order for governmental agencies to claim the immunity and privileges of the United States, it must be clearly shown that it was the inten-

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[15a] *See* Petitioner's brief at 29-30 n.14.

tion of Congress to bestow such privileges and immunities upon the agency in question, and that such privileges cannot be imputed from the mere fact that the agency exercises governmental functions. *See Reconstruction Finance Corp. v. J. G. Menihan Corp.*, 312 U. S. 81 (1941); *Keifer v. Reconstruction Finance Corp.*, 306 U. S. 381 (1939). The Court announced in *Keifer* the rule that "the government does not become the conduit of its immunity in suits against its agents or its instrumentalities merely because they do its work." *Id.* at 388. This rule was reaffirmed in the *Menihan* case with the statement that:

> . . . [I]mmunity in the case of a governmental agency is not presumed. . . . [T]here is no presumption that the agent is clothed with soverign immunity. We look as in the *Keifer* and *Burr* cases to see whether Congress has endowed Petitioner with that immunity and we find no indications whatever of such an intent. *Id.* at 84-85.

See also F.H.A. v. Burr, 309 U.S. 242 (1940); *United States v. Lee*, 106 U. S. 196, 213, 221 (1882); *Sloan Shipyards v. U. S. Fleet Corp.*, 258 U. S. 549, 567 (1921); *Nat'l Volunteer Home v. Parrish*, 229 U. S. 494, 496 (1912). Quite importantly for the purposes of this case, this Court has also noted that no judicial ruling may grant such privileges or immunity in a § 2283 case absent a specific congressional grant of such privileges or immunity, for the reason that Congress has "made it clear beyond cavil that the prohibition (§ 2283) is not to be whittled away by judicial improvisation." *See Amalgamated Clothing Workers v. Richman Bros. Co.*, 348 U. S. 511, 514 (1955).

Yet, the Board urges this Court to imply such power and privileges for the Board in the instant case in order to allow the Board to circumvent the provisions of § 2283. The Board bases this request, in part, on the fact that various exceptions were judicially implied in

considering § 265, the predecessor of § 2283 and that those judicial exceptions were intended by the Congress to survive the change which created § 2283. *See* Petitioner's brief at 6-9, 11-18. Notwithstanding any judicially implied exceptions to former § 265 of the judicial code, the Board's argument must fall for the obvious reason that § 2283 has no implied exceptions, and none of the implied exceptions to former § 265 were intended to survive the change in the law. In support of this proposition the Respondent directs the Court's attention initially to the Reviser's Notes which the Board incorrectly characterizes as not suggesting that the previously recognized exceptions of § 265 were to be effected by new § 2283.

When § 2283 was enacted in its present form, it was changed to delete the prior exception which related only to proceedings in bankruptcy. In commenting upon this change, the Reviser's Notes state that "an exception as to Acts of Congress relating to bankruptcy was omitted and *the general exceptions substituted to cover all exceptions.*" *See* H. R. REP. No. 308, 80th CONG., 1st SESS. as reported in 28 U.S.C.A. § 2283, p. 107 (1965) (emphasis supplied). In commenting upon this change, this Court noted in *Amalgamated Clothing Workers v. Richman Brothers*, 348 U. S. 511 (1955):

> We need not re-examine the series of decisions prior to the enactment of Title 28 of the United States Code in 1948, which appeared to recognize implied exceptions to the historic prohibition against federal interference with state judicial proceedings. *See Toucey v. New York Life Ins. Co.*, 314 U. S. 118. By that enactment Congress made clear beyond cavil that the prohibition is not to be whittled away by judicial improvisation. The 1948 enactment revised as well as codified.
>
> . . .
>
> In lieu of the bankruptcy exceptions of § 265, Congress substituted a generalized phrase covering

all exceptions, such as that of the Interpleader Act, 28 U.S.C. § 2361, to be found in federal statutes. Two newly formulated exceptions to the general prohibition deal with problems of judicial administration which had earlier been the subject of the series of decisions dealt with the in the *Toucey* case. If confirmation of the comprehensive scope thus revealed on the face of the enactment were necessary, it is to be found in the Reviser's Notes, which state:

> "An exception as to Acts of Congress relating to bankruptcy was omitted and the general exception substituted to cover all exceptions."
>
> * * *
>
> This is not a statute conveying a broad general policy for appropriate *ad hoc* application. Legislative policy is here expressed in a clear-cut prohibition qualified only by specifically defined exceptions. *Id.* at 514-16.

The one exception in addition to the three specific statutory exceptions to § 2283 is found in the right of the United States, as the sovereign, to enjoin state court proceedings whenever "the prequisites of relief by way of injunction be present." *See Leiter Minerals, Inc. v. United States*, 352 U. S. 220, 225 (1957). This exception is not so much judicially implied as it is basic to the federal system of government and the "old and well-known rule" that statutes, such as § 2283, which divest pre-existing rights or privileges, such as that of the sovereign to seek a stay of state court proceedings which threaten irreparable injury to a national interest, will not be applied to the United States as the sovereign, without express words to that effect. *See Leiter Minerals, Inc. v. United States, supra* at 224; *United States v. U.M.W.*, 330 U. S. 258, 272 (1947).

However, it is also basic to the federal system of government that the federal government, though supreme in its own sphere, exist with limited jurisdic-

tion, based upon specified functions and subjects delegated to it by the states or legislated to it by the Congress. *See New Orleans v. United States, supra; Pacific Ins. Co. v. Soule, supra; see also* THE FEDERALIST Nos. 45, 46 and 47 (Madison) which is to be given special weight in matters involving basic federal policies, *Transportation Co. v. Wheeling*, 99 U.S. 273, 280 (1878). Thus, just as it is inherent in the federal system of government to reserve to the United States the right to enjoin state court proceedings notwithstanding the limitations of § 2283, it is also basic to the federal system of government to limit the Labor Board to those powers specifically given to it by Congress, and to accord it the status of the United States in this case only if it can be shown that the Congress has clearly demonstrated an intent to confer such powers upon the Board. *See Reconstruction Finance Corp. v. J. G. Menihan Corp., supra; Keifer v. Reconstruction Finance Corp., supra; F.H.A. v. Burr, supra; United States v. Lee, supra; Sloan Shipyards v. U. S. Fleet Corp., supra; Nat'l Volunteer Home v. Parrish, supra.*

The Board has not shown, and the Respondent has not found, any indication that the Congress intended to impart such power to the Board. There is no doubt that if Congress had wanted to give such power to the Board that it would not have had any difficulty in expressing such a desire. *See Bell v. United States*, 349 U. S. 81, 83 (1955). In fact, aside from purely geographic definitions which are used throughout the United States Code, the Congress has specifically defined the term "United States" on a number of occasions relating to the powers, privileges and immunities of the federal government and has never extended the general privileges of the United States to the Labor Board. *See e.g.*, 26 U.S.C. § 4920(1)(4)(D) (1967) making agencies of the federal government the United

States for purposes of the Interest Equalization Tax; *see also* 16 U.S.C. § 460L-2 (Supp. 1971); 16 U.S.C. § 951(e) (Supp. 1971); 21 U.S.C. § 134(c) (Supp. 1971); 42 U.S.C. § 291b(c)(4) (1969); 47 U.S.C. § 330 (b)(2) (1962); 7 U.S.C. § 1301(a)(5) (1964); 7 U.S.C. § 1380p(d) (1964); 7 U.S.C. § 1561(a)(1) (Supp. 1971); 8 U.S.C. § 1185(d) (1970); 12 U.S.C. § 95a(3) (1945); 15 U.S.C. § 69(k) (1963).

Furthermore, it must be assumed that the Congress had knowledge of the decisions of this Court holding that the privileges and immunities of the United States are not conferred upon federal agencies in the absence of a specific congressional grant of such power. *See Federal Power Comm. v. Tuscarora Indian Nation*, 362 U. S. 99, 113 (1960) *rehearing denied* 362 U. S. 956 (1960); *T.I.M.E., Inc. v. United States*, 359 U. S. 464, 474 (1959); *Shapiro v. United States*, 335 U. S. 1, 16 (1948). Therefore, the Congress could certainly have provided for such a grant of power in either the initial statute establishing the Labor Board or in either one of the two major amendments in 1947 or 1959, had it wished to do so.

Since the Congress has not specifically granted the Board the power to exercise the privileges and immunities of the United States, the Respondent submits that it is obvious that the Congress did not intend to give the Board this power. This Court has previously recognized that the Congress regulates by silence as well as by action, and the Respondent submits that the omission of a congressional grant to the contrary compels the conclusion that the National Labor Relations Board is not to be considered the United States for the purposes of this action. *See Passenger Cases*, 48 U. S. (7 How.) 283, 562 (1849). In these circumstances, the Circuit Court was obviously correct in affirming the decision of the District Court to deny the in-

junctive relief sought by the Board. The Respondent urges this Court to also conclude that the Board cannot properly be considered the United States for the purposes of this case, and that the injunctive relief sought by the Board was properly denied.

II.

The Nebraska Mass Picketing Statute does not constitute an unlawful infringement into a federally preempted area.

A. The Constitutionality of the Nebraska Statute Is Not Properly Before This Court on Any Issue Other Than Federal Preemption.

In its petition for a writ of certiorari to the Circuit Court, the Board stated that the question presented by the instant case was

> Whether an agency of the United States is within the governmental exception to the statute which ordinarily prohibits federal courts from enjoining state court proceedings, 28 *U.S.C.* 2283, so that the National Labor Relations Board may, through proceedings in a federal court, enjoin the implementation of a state court order which regulates peaceful picketing governed exclusively by the National Labor Relations Act. *See* Board's petition at 2.

Without bothering to discuss whether or not the picketing in the instant case was peaceful or not, the Board's argument to this Court on the merits has generally stayed within the limits of the question upon which certiorari was granted. However, the Board does make at least one footnote swipe at the constitutionality of the state statute on the grounds that it is broad enough to chill the exercise of "purely peaceful picketing." *See* Board's brief at 34-35 n.16.

The Union, as amicus curiae, levels a broad attack at the state statute and the injunction issued thereun-

der that ranges far beyond the federal preemption considerations of the question presented in the Board's petition for certiorari. For example, the Union contends that the statute is unconstitutionally broad and vague, prohibits activity protected by the First Amendment, and adds to a lack of uniformity in state regulation of picketing. *See* Union's brief at 3-6, 7-15. The Company submits that these areas raise additional questions and change the substance of the one question presented by the Board in its petition for certiorari and, thus, are not properly before this Court. *See* Rule 40(1)(d)(2) of the rules of this Court; *see also Neeley v. Ebey Const. Co.*, 386 U. S. 317, 330 (1967); *J. I. Case Co. v. Borak*, 377 U. S. 426, 428-29 (1964); *State of California v. Taylor*, 353 U. S. 553, 556-57 n.2 (1957).

Further indication that the issues raised by the Union are not contained within the question upon which certiorari was granted and thus not properly before this Court, is found in the fact that even if the issues presented by the Union were presumed to be true, the issue upon which certiorari was granted would not be affected. This is so for the reason that the questions presented by the Union would still not place the Board under any of the three statutory exceptions or the "United States exception" to § 2283 and are, therefore, irrevelant in the determination of the question presented by this case.

Even if the questions presented by the Union were held to be fairly encompassed within the question presented in the Board's petition for certiorari, the unconstitutionality of the Nebraska statute is still not properly before this Court for the reason that state remedies regarding this issue have never been exhausted.[15b]

[15b] Since the First Amendment claims of the Union are not properly before this Court, the federal courts should follow the

Section 2283 has been characterized by this Court as continued recognition on the part of the Congress of the ability of the state courts to adequately safeguard federal and constitutional rights. *See Amalgamated Clothing Workers v. Richman Bros. Co.*, 348 U. S. 511, 517-19 (1955). Thus, if the Union is concerned about the constitutionality of the state statute on the additional grounds that it presents to this Court, the more proper course of action would be for the Union to complete the state court injunction proceedings[16] and then, appeal to the Nebraska Supreme Court if the Union considers the district court ruling to be improper. Of course, the Union also has the right to appeal to this Court from the Nebraska Supreme Court, and there is no reason to believe that the state courts cannot, or will not, protect any federal rights involved in the instant case. *See Douglas v. City of Jeanette*, 319 U. S. 157, 164 (1943) *accord, Tyrone, Inc. v. Wilkinson*, 410 F. 2d 639, 642 (4th Cir. 1969); *see also Stevens v. Frick*, 372 F. 2d 378, 382 (2d Cir. 1967); *Atlantic Coastline R. R. Co. v. Brotherhood of Locomotive Engineers*, 398 U. S. 281, 296 (1970); *Robb v. Connolly*, 111 U. S. 624, 637 (1884).

Since the state court had the right to regulate the picketing in the instant case by virtue of the state police powers, a ruling by this Court that the constitutionality of the state statute should be considered in the instant case would present voluminous problems.

"abstention doctrine" and allow the state courts the first opportunity to pass upon the constitutionality of the Nebraska statute. *See Railroad Comm. of Texas v. Pullman Co.*, 312 U.S. 496, 499-502 (1941); *Harrison v. N.A.A.C.P.*, 360 U.S. 167, 176-177 (1959); *see also Zwickler v. Koota*, 389 U.S. 241, 245-52 (1967).

[16] The state court proceeding, Case No. 16860 before the District Court of Hall County, Nebraska has never proceeded to a hearing on a permanent injunction at the request of local counsel for the Union that the matter be held in abeyance until the federal court proceedings have been completed.

For example, since the action was first brought in the state court, which would allow for appeal of any federal claims to be the Nebraska Supreme Court and ultimately to this Court, basic principles of comity between federal and state courts require that the constitutionality of the state statute be litigated first in the state court. *See c.f., Mast, Foos & Co. v. Stover Mfg. Co.*, 177 U. S. 485, 488 (1900); *Gulf Oil Corp. v. Gilbert*, 330 U. S. 501, 508 (1947); *Milwaukee Gas Speciality Co. v. Mercoid Corp.*, 104 F. 2d 589 (7th Cir. 1939).

Additionally, a decision by this Court on the constitutionality of the state statute before the Nebraska courts have had an opportunity to rule on the matter would encourage federal courts to interfere with controversies involving matters such as picketing where the line between concurrent jurisdiction and federal preemption is not always clear-cut, and the number of courts which could potentially pass on a controversy before the rightful forum for its settlement was established under such a system would be significantly increased. Furthermore, there would be added to this situation "an element of federal-state competition and conflict which may be trusted to be exploited and to complicate, not simplify, existing difficulties." *See Amalgamated Clothing Workers v. Richman Bros. Co.*, 348 U. S. 511, 519 (1955).

For all of these reasons, the Company urges the Court to conclude that beyond the federal preemption issue raised by the question presented in the Board's petition for certiorari, the additional issues raised by the Union relating to the constitutionality of the Nebraska statute are not properly before this Court.

B. The Nebraska Statute Did Not Improperly Invade a Field Preempted by Federal Legislation.

This Court has long recognized that states have a valid interest in the regulation of picketing which, like

that in this case, is clearly not peaceful picketing. *See Milk Wagon Drivers Local 753 v. Meadowmoor Dairies, Inc.*, 312 U.S. 287, 292, 294 (1941); *Youngdahl v. Rainfair*, 355 U. S. 131, 139 (1957); *Carpenters Local 213 v. Ritters Cafe*, 315 U.S. 722, 738-39 (1942) (dissenting opinion); *American Steel Foundries v. Tri-City Central Trades Council*, 257 U. S. 184, 206 (1921); *U.A.W. v. Wisconsin Employment Relations Board*, 351 U. S. 266, 274 (1956). For this reason, the Court has recognized that state mass picketing statutes such as the Nebraska statute which authorized the injunction in the state court, constitute a valid exercise of the state police powers. *See e.g. U.A.W. v. Anderson*, 351 U. S. 959 (1956); *U.A.W. v. Wisconsin Employment Relations Board*, 351 U. S. 266, 271-72 (1956); *Allen-Bradley v. Wisconsin Employment Relations Board*, 315 U. S. 740, 749 (1942); *Youngdahl v. Rainfair Inc.*, 355 U. S. 131, 138-39 (1957); *U.A.W. v. Russel*, 356 U.S. 634, 640 (1958); *Brotherhood of Railroad Trainmen v. Jacksonville Terminal Co.*, 394 U. S. 369, 386 (1969); *U.M.W. v. Gibbs*, 382 U. S. 715, 721 (1966); *Int'l Brotherhood of Teamsters v. Vogt, Inc.*, 354 U. S. 284, 293 (1957); *U.M.W. v. Laburnum Construction Corp.*, 347 U. S. 656, 669 (1954).

As noted previously, there is no justification for concluding that the instant case presents a situation of peaceful picketing. Quite the contrary, the matters which the Company draws to the Court's attention, and which may properly be considered under the doctrine of judicial notice, compel the conclusion that the picketing in the instant case was definitely not peaceful. Such a situation does not present a federal preemption question for, as this Court has recently noted, "the National Labor Relations Act gives no colorable protection to violent and coercive conduct incident to a labor dispute." *See Brotherhood of Railroad Trainmen v. Jack-*

sonville Terminal Co., 394 U. S. 369, 386 (1969); *see also Allen-Bradley v. Wisconsin Employment Relations Board*, 315 U. S. 740, 750 (1942); *Taggart v. Weinacker's, Inc.*, 397 U. S. 223, 228 (1970) (concurring opinion); *U.M.W. v. Gibbs*, 383 U. S. 715, 721 (1966).

The Board and the Union raise various constitutional questions regarding the area of federal preemption, but all of the arguments are based upon the falacious premise that the picketing in the instant case was peaceful. *See* Board's petition at 2. *See* also Board's brief at 34-35 n.16, Union's brief at 6-7. However, since any claim that the picketing in the instant case was peaceful is not factually supported, the Company submits that the issue of federal preemption may not be used to invalidate the state statute in this case. Rather, the Company submits that the facts of this case show the state statute and injunction issued thereunder to be a valid exercise of the state police powers and, thus, not properly before this Court for judgment.

C. Even if the Nebraska Statute Improperly Invaded a Field Preempted by Federal Legislation, the District Court Was Not Thereby Impowered to Ignore the Limitations of 28 U.S.C. § 2283.

Notwithstanding the fact that the instant case does not fall within any of the three statutory exceptions, or clearly within the "United States exception" to § 2283, the Board urges this Court to judicially legislate an exception to § 2283 which would allow the Board to seek injunctions in federal courts against the intrusion by state courts into the labor relations field. *See* Board's brief at 9-10. The Board reasons that Congress has not made an express grant of authority to the Board for every legal proceeding that may be required in the Board's administration of the Act and because the supremacy of the National Labor Relations Act would be "substantially impaired" if the Board were unable to

enjoin state courts that issue injunctions in the field of labor relations. *See* Board's brief at 9-10.

This federal preemption argument on the part of the Board is simply another attempt to have this Court disregard the limitations of § 2283. It was also used in the District Court, and was firmly rejected because of the anomalous "decision-before-judgment" stature of the argument, which totally disregarded the initial jurisdictional limitations of § 2283. As Justice Cardozo once noted, in words particularly applicable to the argument presented by the Board in the instant case:

> Jurisdiction exists that rights may be maintained. Rights are not maintained that jurisdiction may exist. *See Berkovitz v. Arbib*, 230 N.Y. 261, 274 (1921).

Thus, it is understandable that the District Court concluded that the Board must first bring itself within one of the exceptions to § 2283 in order to give the lower court jurisdiction before any preemption argument would be considered (A.47-48).

Before this Court the Board acknowledges that it does not fall within any of the three statutory exceptions to § 2283, argues somewhat weakly that it should be considered to be the United States for the purposes of this case and thus exempted from the limitations of § 2283, and finally, that this Court should judicially imply the power of the Board to seek injunctions in federal court against state court injunctions in the field of labor relations due to the supremacy of the federal law. When all of these arguments are sifted, the third and final argument appears to shed much more light upon what the Board is actually trying to accomplish by this case. The Board, in actuality, is urging this Court to legislate a power which the Congress has not given to the Board and to judicially imply an excep-

tion onto the clear Congressional determination that federal courts *may not* enjoin state court proceedings unless the case falls within three well-defined exceptions.

However, the judicial power of review and interpretation does not include legislation and the Board urges this Court to do something that is not within its powers. *See West Coast Hotel Co. v. Parrish*, 300 U. S. 379, 404 (1937) (dissenting opinion); *Hampton and Co. v. United States*, 276 U. S. 394, 406 (1928); *Evans v. Gore*, 253 U. S. 245, 247 (1920); *Springer v. Phillipine Islands*, 277 U. S. 189, 201 (1928); *O'Donoghue v. United States*, 289 U. S. 516, 530-31 (1933).

The Board's argument has already been considered and rejected by this Court in *Amalgamated Clothing Workers v. Richman Bros.*, 348 U. S. 511 (1955), wherein the Court specifically considered the preemption argument as it related to 28 U.S.C. § 2283 and concluded:

> In the face of this carefully considered enactment (§ 2283), we cannot accept the argument of petitioner and the Board, as *amicus curiae*, that § 2283 does not apply whenever the moving party in the district court alleges that the state court is "wholly without jurisdiction over the subject matter, having invaded a field preempted by the Congress." No such exception had been established by judicial decision under former § 265. In any event, Congress has left no justification for its recognition now. This is not a statute conveying a broad general policy for appropriate *ad hoc* application. Legislative policy is here expressed in a clear-cut prohibition qualified only by specifically defined exceptions.
>
> We are further admonished against taking the liberty of interpolation when Congress clearly left no room for it, by the inadmissibility of the as-

> sumption that ascertainment of pre-emption under the Taft-Hartley Act is self determining or even easy. As we have noted in the *Weber* case, "the areas that have been pre-empted by federal authority and thereby withdrawn from state power are not susceptible of delineation by fixed metes and bounds." 348 U.S. at 480. *Id.* at 515-16.

In addition to these basic problems with the Board's preemption argument, the Company points out that if the labor field is arguably preempted by the federal legislation which established the Labor Board and gave it its powers, then the Board should be required to comply with the terms of that legislation before seeking to enforce a federal preemption doctrine. However, as previously noted, no complaint has been issued in the instant case which would allow the Board to proceed to the district court to seek an injunction under the terms of § 10(j) or 10(l) of the Act. If the jurisdiction of the Board has not even properly attached in the instant case under the statutes alleged to have created a federally preempted field, then it would be manifestly illogical to conclude that the District Court should have been given jurisdiction by virtue of those same statutes.

The Board and the Union appear to agree that the main reason for seeking an injunction in the District Court centered on a concern that the federal rights asserted would be improperly subjected to lengthy delay prior to vindication if the Nebraska Court were allowed to retain jurisdiction. *See* Board's brief at 36 and Union's brief at 10-12. The District Court noted this concern but also specifically noted the limitations of § 2283 and concluded that "Congress has precluded this Court from acting, seeking instead to maintain the traditional dichotomy of the federal and the state courts. We assume, as is proper, that federally protected rights

will be vindicated in state courts to the same extent that they would find vindication in the federal courts." (A.51).

In addition to the assumption that federal rights will find vindication in the state courts as quickly as they would in the federal courts, the Company notes that if the Union or the Board actually faced the threat of "immediate irreparable injury" sufficient to justify an injunction under usual equitable principles, due to the state court injunction, either would have been free to seek injunctive relief from the Nebraska courts or this Court. *See* NEB. REV. STAT. § 25-2006, 2007, 25-1063, 1064 (Reissue 1964); *Atlantic Coastline R. R. Co. v. Brotherhood of Locomotive Engineers*, 398 U. S. 281, 296 (1970); *Natural Gas Co. v. Public Service Comm.*, 294 U.S. 698 (1935); *United States v. Moscow Fire Ins. Co.*, 308 U. S. 542 (1939); *see also Construction & General Laborers Local 438 v. Curry*, 371 U.S. 542 (1963). Furthermore the Union could have utilized a specific Nebraska statutory procedure which allows for expedited trial in the state District Court and the Nebraska Supreme Court in situations where an injunction is sought in federal court against the administration of a Nebraska statute. *See* NEB. REV. STAT. § 25-21,165 to 21,167 (Reissue 1964).

Many courses of action were open to the Board and the Union in the instant case and it is not immediately clear why they chose to proceed in the direction utilized in the instant case. In any event, it is clear that the Board admits that the instant case does not fall within any of the specified exceptions to § 2283 which explicitly prohibits federal courts from granting injunctions against state court proceedings. Furthermore, the Board tacitly admits that its argument that it should be considered the United States for the purpose of this

action and thereby exempted from the provisions of § 2283 is not completely convincing, for the Board goes on to urge this Court to judicially imply an exception for the Board in injunction proceedings such as this on the basis of federal preemption and allow it to escape the limitations of § 2283. However, the dual system of federal and state courts is as old as the constitution itself and the prohibition against federal court injunctions of state court proceedings has been law since 1793. *See Atlantic Coastline R. R. v. Brotherhood of Locomotive Engineers*, 398 U. S. 281, 285 (1970); *see also Warren, Federal and State Court Interference*, 43 HARV. L. REV. 345, 347-48 (1930).

The Congress has maintained the prohibition of § 2283, in some form, ever since that time and this Court has consistently expressed a desire to have federal courts avoid needless friction and conflict with state courts. *See Hale v. Bimco Trading Co., Inc.*, 307 U. S. 375, 378 (1939); *Oklahoma Packing Co. v. Oklahoma Gas & Electric Co.*, 309 U. S. 4, 8-9 (1939); *Toucey v. New York Life Ins. Co.*, 314 U. S. 118, 141 (1941); *Porter v. Dicken*, 328 U. S. 252, 254-55 (1946); *Elkins v. United States*, 364 U. S. 206, 221 (1960); *Atlantic Coastline R. R. Co. v. Brotherhood of Locomotive Engineers*, 398 U. S. 281, 286 (1970).

It is true that the Congress has passed a good deal of legislation in the labor field and has indeed established the National Labor Relations Board to enforce those statutes. However, the Congress has granted the Board only two procedures to obtain injunctions in federal courts and it must be remembered that the Congress regulates by silence as well as by action. *Passenger Cases*, 48 U. S. (7 How.) 283, 562 (1849). Had the Congress wished the Board to be allowed a general power to obtain injunctions or more than the two pow-

ers specified, it must be assumed that the Congress would have enacted legislation to accomplish that purpose. In the absence of such legislation, it must be assumed that the Congress did not intend to provide the Board with such power and any change in that situation will of necessity have to come from the Congress, rather than this Court.

CONCLUSION

For all of the foregoing reasons, the Company urges this Court to conclude that the District Court was correct in dismissing the Board's petition for an injunction of the Nebraska state court proceedings.

Respectfully submitted,

NASH-FINCH CO d/b/a JACK & JILL STORES, Respondent.

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Dated at Lincoln, Nebraska
this 8th day of September, 1971.

ADDENDUM A

IN THE DISTRICT COURT OF HALL COUNTY, NEBRASKA

Case No. 16860

DOC. 56, PAGE 251

NASH-FINCH COMPANY, d/b/a, JACK & JILL STORES, Plaintiff,

V.

AMALGAMATED MEAT CUTTERS AND BUTCHER WORKMEN OF NORTH AMERICA, AFL-CIO, DISTRICT UNION 271; ROBERT J. PARKER; VERNON ALLEN; CHESTER W. O'HARA; J.B. DE FONTAIN; JOHN DOE; AND MARY DOE, DEFENDANTS.

PETITION

Comes now the Plaintiff and for its cause of action against the defendants alleges:

1. That the Plaintiff is a corporation organized and existing under the laws of the State of Delaware authorized to conduct business in the State of Nebraska.

2. That the defendant Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO, District Union 271, hereinafter referred to as District Union No. 271, is an unincorporated association existing for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment or conditions of work. Defendant Robert J. Parker is a business representative of District Union No. 271. Defendant Vernon Allen is a business representative and first vice-president of District Union No. 271. Defendant Chester W. O'Hara is the president of District Union 271. Defendant J. B. DeFontain is the secretary-treasurer of

District Union No. 271. Defendants John Doe and Mary Doe, real and true names unknown are pickets, agents, employees and servants of District Union No. 271.

3. That on May 23, 1969, defendants commenced picketing and continue to picket plaintiff's three retail grocery establishments located in Grand Island at 2121 North Broadwell, 1717 West Second Street, and 1515 South Locust Street.

4. That during the course of the aforesaid picketing, defendants have engaged in the following acts and conduct:

(a) Picketing the entrances and exits of plaintiff's retail stores by means of more than two pickets at the same time within 50 feet of said entrances and exits.

(b) Picketing by means of more than two pickets at the same time within 50 feet of each other.

(c) Stopping, blocking, and preventing the free ingress egress of the public to and from the picketed premises.

5. That the foregoing acts and conduct of defendants constitutes mass picketing as proscribed by Section 28-814.02, R. R. S. Neb. 1943, Reissue 1964.

6. That said picketing is conducted by the display of signs bearing the following legend:

> 'Amalgamated Meat Cutters, District Union No. 271, AFL-CIO, on strike, protesting unfair labor practices, Nash-Finch Company, Jack & Jill Stores. This dispute with the above named employer only,"

and the distribution of handbills to the public, a copy of which is attached hereto marked Exhibit A, and by this reference made a part hereof.

7. That the above representations to the public that a strike exists and that plaintiff has engaged in unfair

labor practices constitutes false and malicious statements proscribed by Section 28-440, R. R. S. Neb., Reissue 1964.

8. That during the course of said picketing, defendants have threatened, intimidated, and coerced the public and plaintiff's customers by the following acts and conduct:

(a) Threatening customers with property loss if they patronize plaintiff's establishments.

(b) Using profane and vulgar language and addressing motorists and plaintiff's customers in a loud, boisterous manner when insisting that they patronize plaintiff's competitors.

9. That during the course of said picketing, defendants have slandered plaintiff's business reputation in the community by falsely and maliciously telling plaintiff's customers that, "There are ants in the meat products."

10. That by reason of the foregoing unlawful picketing and other conduct, plaintiff's operations at its three retail establishments in Grand Island, Nebraska, have been disrupted and the business of the plaintiff has been substantially impaired and diminished. Unless the Restraining Order and Injunction prayed for herein is granted, plaintiff will be further injured and damaged as a result of defendants aforesaid unlawful picketing and other conduct. Plaintiff is suffering immediate and irreparable damage as a result of defendants acts and conduct, and plaintiff does not have an adequate and complete remedy at law.

11. This Court has jurisdiction to enjoin acts and conduct which are violative of the laws of the State of Nebraska, irreparably damage the business reputation of the company, and which breaches the peace of the

community by creating an atmosphere of public intimidation, restraint, and coercion.

WHEREFORE, the plaintiff prays for relief as follows:

(a) That this Court issue a temporary Restraining Order enjoining defendants, its members and agents, and all persons acting in its behalf from picketing and striking plaintiff's three retail stores in Hall County Nebraska, and from otherwise interfering by picketing, striking or other conduct with plaintiff's operations and business in Hall County Nebraska.

(b) That the Court set this matter for hearing for a Temporary Injunction and that upon such hearing the Court enter its Temporary Injunction continuing said restraining order in effect until trial may be had.

(c) That upon trial the Court enter its Final and Permanent Injunction enjoining the defendants in like manner as in aforesaid Restraining Order.

(d) That this Court grant such other relief as in the premises seems just and equitable and award costs of this action to the Plaintiff.

Dated this 27th day of May, 1969.

NASH-FINCH Company, d/b/a,
JACK & JILL STORES, Plaintiff

By: Thomas F. Dowd
Its Attorney

STATE OF NEBRASKA)
) SS
COUNTY OF HALL)

THOMAS F. DOWD, being first duly sworn upon oath, deposes and says that he is the Attorney for the

plaintiff herein, a corporation, that he has read the above and foregoing Petition; knows the contents thereof, and that the allegations contained therein are true as he verily believes.

Thomas F. Dowd

SUBSCRIBED AND SWORN to before me this 27th day of May, 1969

.....Notary Public

EXHIBIT A

To The Public

JACK & JILL STORES

(of Nash-Finch Company)

Grand Island, Nebraska

Are On Strike

Protesting Unfair Labor Practices

Of This Company

THIS COMPANY REFUSES TO BARGAIN OR COMPLY WITH OTHER FINDINGS AND RECOMMENDATIONS OF A TRIAL EXAMINER OF THE NATIONAL LABOR RELATIONS BOARD.

Please Help Us By Not

Shopping at Jack & Jill Stores

Or Any Other Stores Operated By This Company

During This Strike

District Union 271 of the

Amalgated Meat Cutters & Butcher

Workmen of North America, AFL-CIO

AFFIDAVIT

CAL FREY, being first duly sworn, deposes and states under oath:

1) That he is the store manager of the Jack & Jill Store located at 2121 North Broadwell, Grand Island, Nebraska.

2) That commencing on May 23, 1969, Defendant District Union 271 commenced picketing and distributing handbills at the Jack & Jill Store located at 2121 North Broadwell, Grand Island, Nebraska. The legend on the picket signs and the printed matter on the handbills is as alleged in the Petition.

3) That none of the employees of the Jack & Jill Store locted at 2121 North Broadwell, Grand Island, Nebraska, are on strike.

4) That since the picketing commenced on May 23, 1969, I have observed more than two pickets within fifty feet of each other at the same time and more than two pickets within fifty feet of the store parking lot entraces and exists at the same time on more than one occasion each day.

5) That since the picketing commenced on May 23, 1969, I have personnally observed pickets standing in the middle of the parking lot entrances and exists interfering with and hindering ingress and egress of motorists on more than one occasion during each day of the picketing.

Further your affiant sayeth not.

Cal Frey

Subscribed and sworn to before me this 27th day of May, 1969.

Thomas F. Dowd
Notary Public

AFFIDAVIT

DON SALLINGER, being first duly sworn, deposes and states under oath:

1) That he is the manager of the Jack & Jill Store located at 1515 South Locust Street, Grand Island, Nebraska.

2) That commencing on May 23, 1969, Defendant District Union 271 commenced picketing and distributing handbills at the Jack & Jill Store located at 1515 South Locust Street, Grand Island, Nebraska. The legend on the picket signs and the printed matter on the handbills is as alleged in the Petition.

3) That as a result of the picketing which commenced on May 23, 1969, only one employee of this store has failed to return to work, and said employee had tendered her resignation effective June 6, 1969, prior to the May 23, 1969 commencement of picketing.

4) That on May 26, 1969, I personally observed a picket standing in front of and blocking the ingress of a customer motorist, and have received complaints from customers that their vehicles had been stopped by pickets when attempting to enter the store's customer parking lot.

Further this affiant sayeth not.

Don Sallinger

Subscribed and sworn to before me this 27th day of May, 1969.

Thomas F. Dowd
Notary Public

AFFIDAVIT

HERB ROESER, being first duly sworn, deposes and states under oath:

1) That he is the store manager of the Jack & Jill Store located at 1717 West Second Street, Grand Island, Nebraska.

2) That commencing on May 23, 1969, Defendant District Union 271 commenced picketing and distributing handbills at the Jack & Jill Store located at 1717 West Second Street, Grand Island, Nebraska. The legend on the picket signs and the printed matter on the handbills is as alleged in the Petition.

3) That none of the employees of the Jack & Jill Store located at 1717 West Second Street, Grand Island, Nebraska, are on strike.

4) I have personally observed on more than one occasion, each and every day of the picketing, pickets standing in the middle of the entrances and exists to the customer parking lot blocking traffic and hindering and obstructing the free ingress and egress of customers of this store.

5) On May 24, 1969, a customer reported to me the use of vulgar and profane language by the picket which she encountered upon entering this store's customer parking lot.

6) On May 24, 1969, a youngster complained to me that the picket had told him not to buy anything in this store or else he might not have a bike when he came out. On May 25, a customer reported to me that she had been told by the picket upon entering this store's customer parking lot that there were ants in this store's meat.

7) After having observed more than two pickets within fifty feet of each other standing in the middle of the entrances and exits of the store's customer parking lot, including the presence of Robert J. Parker, Union business agent, I notified the Grand Island Police Department and witnessed the pickets disbursing as soon as the police patrol car was observed.

8) I have observed more than two pickets congregating together within fifty feet of each other in this store's entrances and exits to the parking lot after the Grand Island Police Department patrol cars have left the area.

Further your affiant sayeth not.

Herb Roeser

Subscribed and sworn to before me this 27th day of May, 1969.

Thomas F. Dowd
Notary Public

AFFIDAVIT

CLAYTON KENT, being first duly sworn, deposes and states under oath:

1) That I am employed as the zone manager by the Plaintiff herein, for the State of Nebraska.

2) That commencing on May 23, 1969, Defendant District Union 271 commenced picketing and distributing handbills at the three Jack & Jill Stores located at 2121 North Broadwell, 1515 South Locust Street, and 1717 West Second Street, Grand Island, Nebraska. The legend on the picket signs and the printed matter on the handbills is as alleged in the Petition.

3) That as a result of the picketing which commenced on May 23, 1969, only one employee of Plaintiff's three retail establishments in Grand Island, Nebraska, has failed to return to work, said employee having tendered her resignation effective June 6, 1969, prior to commencement of the instant picketing.

4) Since the commencement of the picketing I have observed more than two pickets within fifty feet of each other on more than one occasion on each day of the picketing at the Jack & Jill Store located at 1717 West Second Street, Grand Island, Nebraska. Specifically, I have observed Robert J. Parker and Vernon Allen, business representatives of the Union, standing with two pickets in the middle of the customer parking lot entrance at the 1717 West Second Street store, within fifty feet of each other, which hindered and interfered with the free ingress of traffic.

6) I have personally observed on more than one occasion, each and every day of the picketing, pickets standing in the middle of the customer parking lot entrances and exits at the Jack & Jill store located at 1717 West Second Street.

Further this affiant sayeth not.

Clayton Kent

Subscribed and sworn to before me this 27th day of May, 1969.

Thomas F. Dowd
Notary Public